J & Wong Logging Contractor v Arab Malaysian Eagle Assurance Bhd

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 12 OF 1992
STEVE SHIM J
4 FEBRUARY 1993

Contract *— Limitation — Contractual term — Claim must be referred for adjudication by arbitration within a period of 12 months from the date of disclaimer of liability — Relevant limitation period being six years — Whether term valid — Contracts Act 1950 s 29 — Limitation Act 1953 s 6*

The plaintiffs had taken out an equipment insurance policy dated 22 November 1989 to insure two units of tractors with the defendants. During the currency of the policy on 26 March 1990, one of the tractors was damaged. The plaintiffs lodged a claim under the policy but the defendants rejected the claim contending, inter alia, that the accident did not come within the terms of the policy. Nevertheless, negotiations commenced between the parties. On 11 April 1991, the plaintiffs filed a summons in the sessions court claiming a sum of RM64,675.69 for loss or damage. On 24 September 1991, the plaintiffs wrote to the defendants asking whether the latter would agree to waive the condition requiring the dispute to be referred to arbitration. The defendants replied by letter dated 30 May 1991 offering a specific amount. This offer appeared not to have been accepted but the negotiations on quantum apparently continued unabated until late October or early November 1991. The defendants took the stand that since the plaintiffs had failed to resort to arbitration in compliance with cl 11 of the policy, their right to arbitration was therefore time barred. The plaintiffs filed an application for leave to enlarge time to refer their claim to arbitration pursuant to s 28 of the Arbitration Act 1952. At the outset of the hearing, the plaintiffs raised a preliminary issue relating to the question of whether the court has jurisdiction to consider the application in view of the decision of the Supreme Court in *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185.

Held, dismissing the application:
The consequential effect of cl 11 of the insurance policy was to limit the time within which the plaintiffs were allowed to enforce their rights in a court of law. It is therefore void by reason of the provisions of s 29 of the Contracts Act 1950 because it had the effect of restricting the plaintiffs' statutory period for bringing an action under s 6 of the Limitation Act 1953. In the premises, the court cannot entertain the merits of the application.

[Bahasa Malaysia summary

Plaintif telah memperoleh suatu polisi insurans peralatan bertarikh 22 November 1989 untuk menginsuranskan dua unit traktor dengan defendan. Semasa polisi itu masih hidup pada 26 Mac 1990, satu daripada traktor itu telah rosak. Plaintif telah membuat suatu tuntutan di bawah polisi itu tetapi defendan menolak tuntutan itu mendakwa,

antara lain, bahawa kemalangan itu tidak termasuk dalam terma polisi itu. Walau bagaimanapun, perundingan dimulakan antara kedua pihak itu. Pada 11 April 1991, plaintif memfailkan suatu saman dalam mahkamah sesyen menuntut jumlah RM64,675.69 kerana kehilangan atau kerugiannya. Pada 24 September 1991, plaintif menulis kepada defendan bertanya sama ada defendan bersetuju tuntuk mengenepikan syarat mengkehendaki pertikaian itu dikemukakan untuk ditimbang tara. Defendan menjawab melalui surat bertarikh 30 Mei 1991 menawarkan amaun tertentu. Tawaran itu nampaknya tidak diterima tetapi perundingan tentang kuantum rupanya diteruskan dengan tidak berkurang sehingga lewat Oktober atau awal November 1991. Defendan berpendapat bahawa kerana plaintif telah gagal mengemukakan perkara itu untuk ditimbang tara mematuhi fasal II polisi itu, hak mereka untuk menimbang tara perkara itu oleh itu dilarang had masa. Plaintif memfailkan suatu permohonan untuk kebenaran melanjutkan masa untuk mengemukakan tuntutan mereka untuk ditimbang tara mengikut s 28 Akta Timbangtara 1952. Pada permulaan pembicaraan itu, plaintif menimbulkan suatu isu permulaan mengenai soalan sama ada mahkamah mempunyai bidang kuasa untuk mempertimbangkan permohonan itu melihat keputusan Mahkamah Agung dalam kes *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185.

Diputuskan, menolak permohonan itu:
Kesan berbangkit fasal II polisi insurans itu adalah untuk menghadkan masa dalam mana plaintif dibenarkan menguatkuasakan hak mereka dalam mahkamah undang-undang. Oleh kerana itu ia adalah tidak sah mengikut peruntukan masa statutori plaintif untuk membawa tindakan di bawah s 6 Akta Had Masa 1953. Dari itu, mahkamah tidak boleh mempertimbangkan merit permohonan itu.]

Cases referred to

1 *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185 (folld)
2 *Corporation Royal Exchange v Teck Guan* [1912] 3 FMSLR 92 (refd)
3 *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (refd)
4 *Malaysia National Insurance Sdn Bhd v Meraslam* [1982] 1 MLJ 274 (distd)

Legislation referred to
Contracts Act 1950 s 29

Ting Sing Chuan (*Yong & Wong Advocates*) for the plaintiffs.
Stephen Chung (*Stephen Chung Advocate*) for the defendants.

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Steve Shim J: By originating summons dated 19 December 1992, the plaintiffs have applied for an order pursuant to s 28 of the Arbitration Act 1952, to extend time within which to give notice to appoint an arbitrator or arbitrators in respect of their claim for loss or damage arising under an arbitration clause contained in an equipment insurance policy dated 28

November 1989 made between the plaintiffs and the defendants. In support, the plaintiffs have filed an affidavit affirmed by one Johnny Ngu on 14 February 1992 followed by a supplementary affidavit affirmed by the same person on 6 May 1992. The application is resisted by the defendants which have filed an affidavit in opposition affirmed by one Lu Yieng Lin, a branch officer of the defendants.

The brief facts as disclosed in the affidavits can be stated herein. The plaintiffs had insured two units of tractors with the defendants under an insurance policy dated 22 November 1989 for the sum of RM80,000 each covering the period from 24 November 1989 to 23 November 1990. During the currency of the policy on 26 March 1990, one of the tractors was damaged when it tipped and slided to a level of 15 to 20 ft below the road. The plaintiffs lodged a claim under the policy but the defendants rejected the claim contending, inter alia, that the accident did not come within the terms of the policy which entitled the plaintiffs to claim for loss or damage. Nevertheless, negotiations commenced between the parties. On 11 April 1991 the plaintiffs filed a summons in the sessions court claiming the sum of RM6,4675.69 for loss or damage under the insurance policy and on 24 April 1991, they wrote to the defendants asking whether the latter would agree to waive the condition requiring the dispute to be referred to arbitration. The defendants replied by a letter dated 30 May 1991 offering a specific amount, computed on the basis stated therein, to settle the matter. This offer appeared not to have been accepted by the plaintiffs but the negotiations on quantum apparently continued unabated until late October or early November 1991. Neither the fact of negotiations nor the length and intensity allegedly taken up by the negotiations had been disputed by the defendants. The defendants took the stand that since the plaintiffs had failed to resort to arbitration in compliance with cl 11 of the policy, their right to arbitration was therefore time-barred. Hence, the present application for enlargement of time under s 20 of the Arbitration Act 1952, on the part of the plaintiffs.

Notwithstanding the fact that this application comes from the plaintiffs, Mr SC Ting for the plaintiffs, has nevertheless at the outset, raised a preliminary issue relating to the question of whether this court has jurisdiction to consider the application in view of the decision in a recent Supreme Court case of *New Zealand Insurance Co Ltd v Ong Choon Lin*.[1] Such a stand tends to suggest that the plaintiffs would probably not have made this application had they or their solicitors been aware of the decision in question. One of the major issues in that case related to the question of whether a particular condition of the fire insurance policy contravened s 29 of the Contracts Act 1950 ('the Act'). To appreciate the full force of the decision of the Supreme Court, it is, I think, necessary to know the salient facts which can be briefly stated herein. The respondent was the sole proprietor of a company which was concerned in the business of selling motor spare parts and accessories. He took out a fire insurance policy with the appellant against loss and damage to his property. During the currency of the policy, a fire broke out which gutted the premises of the respondent. He submitted a claim to the appellant but it was rejected. As a result, the respondent filed a suit for contractual indemnity in respect of the loss to his goods caused by the fire. This was effected some 17 months after the fire and after the expiry

of the stipulated 12 month period within which a suit could be brought as provided for in condition 19 of the policy.

Now, it is Mr Ting's contention that the said condition 19 is similar to cl 11 in our case in substance and effect and that since the Supreme Court in *New Zealand Insurance*[1] has upheld the High Court decision in declaring such a condition to be void for contravention of s 29 of the Act this court would have no jurisdiction to consider the merits of the present application. Mr Stephen Chung for the defendants has however submitted that the court does have jurisdiction. I shall avert to his contentions more fully at a later stage. In the meantime, it is appropriate to examine in more detail condition 19 and cl 11 on a comparative basis to determine whether they are similar in substance and effect as contended by Mr Ting. Condition 19 stipulates:

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

And cl 11 of the equipment insurance policy in the instant case stipulates as follows:

> All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calender month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company.
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> If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calender months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

Quite evidently, there are two limbs attached to cl 11 above. They are firstly, that all differences arising out of the policy shall be referred to arbitration to be presided by an umpire upon agreement with the aid of one or two arbitrators and that the making of the arbitration award shall be a condition precedent to any right of action by the insured against the company; secondly, that if the insured fails to refer any claim to arbitration within 12 months from the date of the company's disclaimer of liability, then the claim shall be deemed to have been abandoned and shall not be recoverable. It seems clear that the words 'shall not thereafter be recoverable hereunder' relate to any right of action which may be contemplated by the insured against the company. The first limb provides quite explicitly that such action can only be invoked after the making of the arbitration award or conversely, that the insured is prohibited from seeking redress to the court before the arbitration award is made. The second limb provides that the company shall not be liable for any claim if the insured fails to refer such claim to arbitration within 12 months from the date of the company's disclaimer of liability. I would accept therefore that both in substance and effect, condition 19 and the second limb of cl 11 aforesaid are similar.

Perhaps more to the point is condition 13 of the insurance policy in *Corporation Royal Exchange v Teck Guan.*[2] That condition stipulates thus:

> If the claim be made and rejected an action or suit be not commenced within three months, after such rejection, all benefit under this policy shall be forfeited.

The said condition was held to be void under s 28 of the Contract Enactment which is in pari materia to s 29 of the Act. On a close scrutiny of the provisions contained therein, I would consider condition 19 and condition 13 cited above to be similar to the second limb of cl 11 in our case, both in substance and effect. In dealing with condition 19, the Supreme Court in *New Zealand Insurance,*[1] after discussing the Indian cases cited before it, came to the following conclusions [at pp 194–195]:

> It would appear from the authorities submitted by counsel for both parties that the preponderant view of the Indian courts is that conditions similar to condition 19 of the fire policy do not infringe or contravene s 28 of the Indian Contract Act, the provisions of which, as mentioned, are identical to those of s 29 of our Contract Act 1950. It would appear that the validity of a condition similar to condition 19 of the fire policy has been upheld in the Indian cases called in aid by counsel for the appellant principally on the distinction that has been made between rights on the one hand and remedies on the other clearly implied in ground (5) of the passage quoted above from the judgment of AN Grover J in the *Pearl Insurance Co* case AIR 1960 Punjab 236.
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> This distinction between the existence of a right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this court in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] MLJ 230 ...
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> It is clear therefore that the legal distinction that obtains in the relevant Indian decisions that have been referred to between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law in the eyes of which the distinction is merely semantic. We do not think that a right can be dissociated from its remedy. We are therefore of the opinion that condition 19 of the fire policy contravenes s 29 of the Contracts Act 1950. The learned judge was therefore correct in holding that condition 19 of the fire policy is void by virtue of the imperative words of s 29 of the Contracts Act 1950 as it clearly limits the time within which the respondent can enforce his right under s 6(1)(a) of the Limitation Act 1953.

Thus, the decision of the Supreme Court is perfectly clear. It has declared that condition 19 aforesaid contravenes s 29 of the Act, which states:

> Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that effect.

Mr Stephen Chung for the defendants has, as I have said, maintained that the court has jurisdiction to deal with the present application. He contends that there is nothing in *New Zealand Insurance*[1] to indicate that the court has no jurisdiction in an application of this nature and that that case can be distinguished from our case on facts and issues. He lays emphasis on the words 'restricted absolutely' in s 29 of the Act, and contends that the plaintiffs in the instant case are not restricted absolutely from enforcing their rights in court, relying, it seems, on a provision in cl 11 which states that 'the making of an award shall be a condition precedent to any right of action against the company'. That may be so, but I think that in the context

of this case, the more relevant provision is the other limb of s 29 which states as follows: 'or which limits the time within which he may enforce his rights'. Here, by reason of the condition precedent provision in cl 11, the plaintiffs are prohibited from seeking redress to the court before arbitration and hence, if there is no reference to arbitration within 12 months from the date of the defendants' disclaimer of liability, no right of action in court can arise in favour of the plaintiffs against the defendants in respect of any claim under the policy. The consequential effect is to limit the time within which the plaintiffs are allowed to enforce their rights in a court of law. This, therefore, falls squarely within the ambit of s 29 of the Act. It should be noted here that the Supreme Court in *New Zealand Insurance*[1] has held that the so-called legal distinction between a right and its remedy, propagated and accepted by the Indian case authorities, does not really exist in Malaysian law, citing in support the case of *Hock Hua Bank Bhd v Leong Yew Chin*.[3] The fact that, in this case, the plaintiffs have actually issued a summons dated 9 May 1991 in the Sessions Court, Sibu, against the defendants, claiming for loss or damage in respect of the insurance policy, does not however resolve the matter because, as I have said, under the first limb of cl 11, no court action is maintainable by or allowable to the plaintiffs before arbitration. In this particular respect, I think it differs from condition 19 in *New Zealand Insurance*[1] because the words 'unless the claim is the subject of pending action or arbitration' contained therein, seem to provide the insured an option, within the period stipulated therein, to either take action in court or refer to arbitration. Under cl 11, such an option is non-existent. On the contrary, it is expressly stipulated that arbitration shall be a condition precedent to any right of action against the company. It is of course common ground that there has been no arbitration in this case. In the circumstances and when examined in the context above, I should think it quite premature, if not improper, for the plaintiffs to have filled the said summons before arbitration has taken place and an award obtained therefrom. Mr Chung has also relied on the authority of *Malaysia National Insurance Sdn Bhd v Maraslam*[4] which had dealt with an application similar in nature to the present application. It related to a condition in an insurance policy which is on all fours with cl 11 in our case. He seems to contend the fact that the Supreme Court in that case proceeded to deal with the merits of the application as tending to imply that this court must also have jurisdiction, but I think it is quite obvious that the Supreme Court in *Malaysia National Insurance*,[4] did not have the opportunity to consider s 29 of the Act. Its attention was not drawn to this particular aspect of the law. In the circumstances, I do not think that that case can have any bearing upon the preliminary issue under consideration here.

For the reasons given, I am of the view that cl 11, in particular the second limb therein, of the equipment insurance policy, to the extent in which it has limited the time within which the plaintiffs are allowed to enforce their rights in court, is void by reason of the provisions of s 29 of the Act. It has the effect of restricting the plaintiffs' statutory period for bringing an action under s 6 of the Limitation Act 1953. In the premises and in the light of the ratio in *New Zealand Insurance*,[1] I am bound to hold that this court cannot entertain the merits of this application. No order as to costs.

Order accordingly.

Reported by S Radhakrishnan